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No. 04-_____

In The
Supreme Court of the United States

PEABODY COAL COMPANY,
PEABODY WESTERN COAL COMPANY, and
PEABODY HOLDING COMPANY, INC.,

Petitioners,

v.

THE NAVAJO NATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal question subject-matter jurisdiction arises pursuant to 28 U.S.C. § 1331 over an action to enforce an amendment to a mineral lease between a federally recognized Indian tribe and a private corporation, when both the lease and amendment have been approved by the Secretary of the Interior under the Indian Mineral Leasing Act of 1938 ("IMLA"), 52 Stat. 347, 25 U.S.C. § 396a, and when the tribe has disputed the validity of the lease amendment on grounds already rejected by this Court in *United States v. Navajo Nation*, 537 U.S. 488 (2003).

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), petitioners state that the parties to the proceeding in the court of appeals and district court were Peabody Coal Company, Peabody Western Coal Company, Peabody Holding Company, Inc., and the Navajo Nation.

RULE 29.6 STATEMENT

The parent corporation and publicly held company that owns 10 percent or more of the stock of petitioners is Peabody Energy Corporation. Fidelity Management & Research Company and Wellington Management Company, LLP, each own more than 10% of Peabody Energy.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Company, Inc. (collectively, "Peabody") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-14a) is reported at 373 F.3d 945. The opinion of the district court (*id.* 15a-26a) is unreported.

JURISDICTION

The court of appeals issued its decision on June 15, 2004. Peabody's timely petition for rehearing was denied on August 10, 2004. Pet. App. 28a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Indian Mineral Leasing Act of 1938 ("IMLA"), 52 Stat. 347, 25 U.S.C. § 396a, provides in relevant part:

> Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for

terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

STATEMENT OF THE CASE

This case is a continuation of a dispute previously before this Court in *United States v. Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo Nation*"). In *Navajo Nation*, this Court held that the Interior Secretary's approval of a package of coal lease amendments in 1987 (the "1987 Lease Amendments") was both substantively and procedurally valid. The Navajo Nation has been unwilling to accept that judgment and has continued to challenge the validity of the 1987 Lease Amendments in litigation with Peabody.

The question in this case is whether there is federal subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 over an action by Peabody to enforce the federally approved coal lease provisions against the Navajo Nation. The Ninth Circuit held that federal jurisdiction does not arise in such circumstances, even where the tribe has filed separate federal court actions seeking to invalidate the lease provisions and to challenge the Interior Secretary's approval as a breach of federal law.

The Ninth Circuit's holding conflicts with decisions in the Fifth, Eighth, and Tenth Circuits, which have recognized the existence of federal jurisdiction in similar situations involving federally approved agreements with Indian tribes.

Review is also warranted because the decision below concerns an important issue of federal law and will have significant ramifications for parties in commercial

relationships with Indian tribes. The court of appeals' decision threatens to strip private parties of the federal judicial forum for which they bargained and to disrupt the congressional scheme for encouraging commercial dealings with Indian tribes.

This case is a particularly suitable vehicle to resolve the questions presented because the reasons advanced by the Navajo Nation to repudiate the 1987 Lease Amendments are the very grounds rejected by this Court in its *Navajo Nation* decision. If federal jurisdiction to enforce a federally approved agreement does not lie in a case where an Indian tribe seeks to repudiate the agreement on grounds already rejected by this Court, it is difficult to imagine when such jurisdiction would ever arise. This Court's review is urgently needed.

A. Statutory Background.

Indian mineral leasing is subject to extensive federal regulation. The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), citing *Worcester v. Georgia*, 6 Pet. 515, 561 (1832). Statutes dating from the first Congress prohibit conveyances of Indian resources without federal approval. *See* 25 U.S.C. §§ 2, 177. The Treaty Between the United States of America and the Navajo Tribe of Indians, 9 Stat. 974 (1849) grants the federal government "sole and exclusive right of regulating the trade and intercourse" with the Navajo.

Congress first authorized mineral leasing of Indian lands in the Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 397 (1891 Act), which authorized leases for terms not to

exceed 10 years on lands "bought and paid for" by the Indians. The 1891 Act was amended by the 1924 Act, which provided in pertinent part:

> Unallotted land . . . subject to lease for mining purposes for a period of ten years under section 397 . . . may be leased . . . by the Secretary of the Interior, with the consent of the [Indian] council . . . , for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities.

In 1938, Congress enacted IMLA under which mineral leases between Native tribes and commercial companies are not effective unless approved by the Secretary of the Interior. 25 U.S.C. § 396a. Congress adopted IMLA in an effort to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess., 2 (1937).

The Act also established uniform leasing procedures. *See* 25 U.S.C. §§ 396b-396g. These procedures govern lease duration, payment methods, permits, inspections, federal approval of leases and permission to start operations, fees, penalties, assignment, surrender, cancellation, and numerous other issues. *See* 25 C.F.R. Part 211.

The federal government has long enforced minimum royalty rates through regulations, Secretarial orders, and binding policies. The Peabody leases at issue in this case have always complied with (or exceeded) these requirements. *See, e.g.*, 25 C.F.R. § 186.15 (1939) (minimum of 10 cents per ton); 25 C.F.R. § 186.15(c) (1957) (same); 25

C.F.R. § 171.15(c) (1981) (same); 25 C.F.R. § 211.15(c) (1987) (same); 25 C.F.R. § 211.43 (2000) (12.5% for surface-mined coal).

Further, the operation of surface mining activities on Indian lands is regulated by a host of federal statutes. The Surface Mining Control and Reclamation Act of 1977 ("SMCRA") contains a special section regarding Indian lands. 30 U.S.C. § 1300. Regulations promulgated under SMCRA address signs and markers, post-mining use of land, backfilling and grading, disposal of waste materials, preservation of topsoil, protection of hydrologic systems, revegetation, federal inspections, enforcement by the Department, civil penalties, and appeals of federal decisions under these regulations. *See* 25 C.F.R. Part 216, Subpart B.

The federal Office of Surface Mining Reclamation and Enforcement ("OSMRE") is "the regulatory authority on Indian lands." 30 C.F.R. § 750.6(a)(1). OSMRE is authorized to approve or disapprove permits to conduct surface coal mining operations on Indian lands, conduct inspections, assure that operators comply with special requirements relating to the protection of non-coal resources on Indian lands, and review environmental performance bond. *Id.* at § 750.6(a). The federal Bureau of Land Management ("BLM") is responsible for reviewing coal exploration and mining plans, administering and enforcing requirements for coal exploration plans, administering lease terms and conditions, and enforcing lease terms relating to production verification for royalty purposes. *Id.* at § 750.6(b). The Minerals Management Service ("MMS") is the federal agency responsible for collecting and accounting for royalties and other income from Indian royalty agreements. *Id.* at § 750.6(c); *see also id.* at § 750.1.

The Bureau of Indian Affairs ("BIA") is responsible for consulting directly with and providing representation for Indian mineral owners and other Indian land owners in matters relating to surface coal mining and reclamation operations on Indian lands. *Id.* at § 750.6(d).

B. The 1987 Lease Amendments.

This case involves two federally approved coal leases between Peabody and the Navajo Nation: Lease 8580, also known as the North Lease, approved in 1964, and Lease 9910, known as the South Lease, approved in 1966. The original North Lease provided for payment of royalties based upon the volume of coal sold by Peabody. The original lease also provided that the specified royalty rates could be reopened and reasonably readjusted by the Interior Secretary twenty years after its effective date. The South Lease has no reopener provision.

In March 1984, the Navajo Nation Chairman unilaterally sent an ex parte letter to Interior Secretary Clark requesting an increase for North Lease royalty rate to 12.5%, and asked for his assistance in securing a voluntary adjustment of the other leases. In June 1984, Area Director Donald Dodge of the BIA, purporting to act on behalf of the Interior Secretary, issued an "opinion letter" adjusting the North Lease royalty rate from 37.5 cents per ton of coal to 20% of the gross coal proceeds. The "opinion letter" did not address the South Leases.

In July 1984, Peabody filed an informal administrative appeal of the Dodge rate within the Interior Department. On July 5, 1985, Peabody sent a letter to newly appointed Interior Secretary Hodel, with a copy to the Navajo Nation, stating that the Navajo Nation had

learned of an imminent and favorable ruling and urging the Secretary to postpone resolution of the administrative proceedings in favor of a voluntary settlement by the parties. Subsequently in July 1985, a consultant retained by Peabody and known to Secretary Hodel, met directly with the Secretary to ask that any ruling be deferred to allow the parties to complete ongoing settlement negotiations. On July 17, 1985, Secretary Hodel sent a memorandum "suggest[ing]" that Fritz "inform the involved parties that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." "Any royalty adjustment which is imposed on those parties without their concurrence," the memorandum stated, "will almost certainly be the subject of protracted and costly appeals," and "could well impair the future of the contractual relationship" between the parties. Secretary Hodel added, however, that the memorandum "was not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal." 537 U.S. at 498. The Tribe was not told of the Secretary's memorandum, but learned that "someone from Washington" had urged a return to the bargaining table. *Id.* (citation omitted).

As this Court held in *Navajo Nation*, the Secretary's conduct did not violate applicable procedural regulations, and the Secretary had the authority to modify any royalty rate that would have resulted from the informal administrative appeal process. Further, the Navajo Nation failed to invoke the more formal procedures for administrative review that were available. 537 U.S. at 513-14.

In September 1987, the parties reached a tentative agreement on a package of lease amendments. On November

20, 1987, the Navajo Nation and Peabody executed the 1987 Lease Amendments, which provided, among other things, a royalty rate of 12.5% for the North Lease. The parties agreed to petition the Secretary to vacate the Area Director's previous decision setting the rate at 20%. The amendments also contained a number of additional benefits for plaintiffs, including a royalty rate adjustment on the South Leases to 12.5% despite the absence of a rate reopener provision. In addition, Peabody agreed to pay the Tribe $1.5 million when the amendments became effective upon Secretarial approval, and $7.5 million more when Peabody began mining additional coal as authorized by the Lease Amendment. The 1987 Lease Amendments also addressed the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments.

The amendments also created new procedures to adjust royalty rates in the future. Removing the provision in the North Lease that permitted the Secretary to adjust the royalty rate, the parties substituted arbitration clauses in both leases as "the sole and exclusive method for the determination or readjustment of royalty rates . . . for periods beginning on and after February 1, 1984." The Navajo Nation also agreed to waive its sovereign immunity from actions to enforce or appeal any resulting arbitration decision:

> Lessor and its officers acting in their official capacity consent to suit in the United States District Court for the District of Arizona for the limited purpose of the enforcement or appeal of any arbitration decision pursuant to this Article, and agree not to raise sovereign immunity or

> exhaustion of tribal remedies as a defense to such suit.

Pet. App. 4a.

The Navajo Nation also agreed that the original lease and the 1987 Amendments are "valid and enforceable and in the best interests of Lessee and Lessor and its people." The Navajo Nation sought the approval of the 1987 Lease Amendments by the Interior Secretary pursuant to IMLA, 25 U.S.C. § 396a. On December 14, 1987, the Secretary approved the 1987 Lease Amendments.

C. The 1998 Lease Amendments.

In February 1998, the Navajo Nation initiated arbitration proceedings pursuant to the 1987 Lease Amendments. In a submission to the U.S. District Court in Arizona, the Navajo Nation recognized the existence of federal question jurisdiction over its arbitration request: "[t]his Court has jurisdiction over this petition pursuant to 28 U.S.C. §§ 1331 and 1362. The Navajo Nation's authority to enter into the Coal Leases arises under federal law [citing IMLA]." Joint Petition ¶ 4 (filed June 1, 1998).

After assembling an arbitration panel and undertaking discovery, the Navajo Nation executed an Arbitration Settlement Agreement, physically attached to which was a Stipulated Arbitration Award as Exhibit A and a Lease Amendment as Exhibit B (the "1998 Lease Amendments"). The Arbitration Settlement Agreement provided that "the parties have agreed to a settlement premised on the final and irrevocable resolution of the arbitration proceedings and the submission of the Lease Amendment Agreement . . . to the Secretary of the Interior for approval."

The Arbitration Settlement Agreement provided that "[t]he entry of the final arbitration award shall not be contingent or otherwise dependent upon the approval of the Navajo Nation Council or the Secretary of the Lease Amendment Agreement." The Settlement Agreement provided that, within ten days of entry of the arbitration award, Peabody would pay the Navajo Nation two one-million-dollar bonuses required under both the North and South Leases pursuant to the 1987 Lease Amendments. This obligation was triggered by the entry of the final arbitration award and was not contingent on approval by the Secretary of the 1998 Lease Amendments.

The Arbitration Settlement Agreement also specified that Peabody "and the Navajo Nation agree that they shall execute and [*sic*] diligently and in good faith urge, support and encourage the Secretary to approve the Lease Amendment Agreement as expeditiously as reasonably possible [and] *[i]f the Secretary fails to approve the Lease Amendment Agreement, then [Peabody] shall have no obligation to make any of the payments set forth therein.*" (emphasis added).

The 1998 Lease Amendments provided for additional payments by Peabody to the Navajo Nation – separate and apart from the two one-million-dollar bonuses required under the 1987 Lease Amendments upon entry of the arbitration award. In particular, the 1998 Lease Amendments provided for a lump sum payment of $1 million within ten days of the Secretary's approval of 1998 Lease Amendments if approved on or before March 31, 1999, and annual payments by Peabody of $3.5 million for the years 1998 through 2007.

Thus, entry of the Arbitration Award required a bonus payment to the Navajo Nation within ten days (as provided for in the 1987 Lease Amendments), but Peabody would otherwise have no obligations under the 1998 Lease Amendments *until they were approved by the Secretary*.

By letter of October 14, 1998, the Navajo Nation requested the Interior Secretary to approve the 1998 Lease Amendments. On March 29, 1999, the Secretary approved the 1998 Lease Amendments under IMLA, thereby rendering them "effective."

In September 1998, Peabody paid the Navajo Nation the two one-million-dollar bonus payments required under the terms of the 1987 Lease Amendments. In April 1999, Peabody paid the Navajo Nation the payments required under the 1998 Lease Amendments totaling $4.5 million. Since 1987, and pursuant to these federally approved lease amendments, Peabody has provided the Navajo Nation with hundreds of millions of dollars in economic benefits.

D. The Navajo Nation's Challenges To The Lease Amendments.

Despite the enormous financial benefits conferred by Peabody, the Navajo Nation has taken repeated steps to attack the federally approved 1987 and 1998 Lease Amendments. The Navajo Nation has sought to challenge those amendments in lawsuits filed against the United States as well as against Peabody.

1. The Navajo Nation's Suit Against The United States.

In 1993, the Navajo Nation filed suit against the United States in the Court of Federal Claims, alleging a

breach of trust by the Secretary of the Interior in the proceedings leading to the approval of the 1987 Amendments. The tribe sought some $600 million in damages.

The Court of Federal Claims dismissed the suit, holding that the Navajo Nation had failed to establish a specific fiduciary duty owed by the Secretary of the Interior or any breach thereof. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 229 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003). A divided panel of the Federal Circuit reversed, finding that the Interior Secretary had specific fiduciary duties under IMLA, 25 U.S.C. § 396a, the Indian Mineral Development Act, 25 U.S.C. § 2101 ("IMDA"), 25 U.S.C. § 399, and their implementing regulations. 263 F.3d 1325, 1330-32 (Fed. Cir. 2001).

This Court granted certiorari and reversed the Federal Circuit's judgment, holding (as had the CFC) that the Navajo Nation had failed to establish either a specific fiduciary duty or a breach thereof. *Navajo Nation*, 537 U.S. at 507-09. This Court opined that "we have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514. In particular, this Court rejected the Navajo Nation's claim that the Secretary breached his duties by intervening in Peabody's administrative appeal, allegedly resulting in an unfair royalty rate. The Court held that the Secretary's conduct was consistent with IMLA and the applicable regulations; that the Navajo Nation had failed to invoke the more formal administrative review procedures that were available; and that the Secretary had the authority to modify any royalty rate that would have resulted from the administrative appeal process in any event. 537 U.S. at 513-14.

2. The Navajo Nation's Arizona Suit Against Peabody.

In 1993, the Navajo Nation filed suit against Peabody in the U.S. District Court for the District of Arizona seeking a declaratory judgment that, inter alia, the 1987 Lease Amendments were invalid. The complaint expressly sought the cancellation, reformation, and renegotiation of the 1987 Lease Amendments. Tellingly, in ¶ 3 of its complaint in that case, the Navajo Nation recognized that there was federal question jurisdiction over its claim under IMLA. Pet. App. 12a n.4 (noting 1993 Navajo Nation suit challenging validity of leases).

3. The Navajo Nation's D.C. Suit Against Peabody.

In June 1999, the Navajo Nation filed a complaint in the United States District Court for the District of Columbia alleging violations of the civil RICO statute, fraud, and various other causes of action relating to the 1987 Lease Amendments. The district court observed that "the core" of the lawsuit was based on the same allegations as the Navajo Nation's action against the United States. *Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 272 (D.D.C.), *aff'd*, 64 Fed. Appx. 783 (D.C. Cir. 2003).

The gravamen of the Navajo Nation's claim in the district court RICO action was that Peabody made prohibited *ex parte* communications to Secretary Hodel, inducing him to intervene in the administrative appeal process and to issue the July 1985 Hodel memorandum. The Navajo Nation's bargaining position was allegedly compromised,

resulting in the same "unfair" and "improvident" terms of the 1987 Lease Amendments.[1] This conduct supposedly represented a breach of the Secretary's fiduciary duties to the Navajo Nation, including an alleged duty to maximize its financial returns under the coal leases, which this Court has squarely rejected.[2] *Navajo Nation* 537 U.S. at 511 n.16.

The Navajo Nation sought a declaratory judgment that the 1987 Lease Amendments were invalid and should be "terminated." The Navajo Nation asked for a judicial ruling that it was entitled to "eject" Peabody from its land. Alternatively, the Navajo Nation sought retroactively to "reform" the coal leases to incorporate the 20% initially set in 1984 by the BIA Area Director royalty rate and to rescind the arbitration procedure the parties used in 1998 to achieve the award here.

E. The Instant Lawsuit.

In response to the Navajo Nation's repeated attempts to invalidate the federally approved lease amendments, Peabody filed the instant suit in the United States District Court for the District of Arizona on February 21, 2002. Peabody sought a declaratory judgment that the 1998 Arbitration Settlement Agreement, the Stipulated Arbitration Award, and the 1998 Lease Amendments were valid and binding on the Navajo Nation.

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[1] NN Am. Compl., ¶¶ 14, 17, 20, 67, 68, 121, 122, 128, 133, 134, 142, 148, 154, 160, 169, 179, 191, 198, 207, 217, 227, 238, 248, 251, 262, 268, 272, 277.

[2] NN Am. Compl., ¶¶ 18, 19, 26, 82, 95, 102, 103, 125, 127, 128, 129, 164, 166, 167, 173, 175, 177, 179, 183, 185, 186, 191.

The district court dismissed Peabody's action for lack of federal subject-matter jurisdiction. The district court noted Peabody's argument that "the 'extensive involvement of IMLA' in the 1998 agreement is sufficient to confer federal question jurisdiction." Pet. App. 25a. The court recognized the holdings of decisions in other circuits finding jurisdiction in cases involving federally approved agreements. *Id.* But the district court held that "[t]his rule, as suggested by Peabody, contradicts the Ninth Circuit precedent which this court is bound to follow." *Id.*

The Ninth Circuit affirmed. The court of appeals held that federal jurisdiction was absent because the "arbitration award did not require approval by the Secretary" and "the final arbitration award for which Peabody seeks enforcement was *not* federally approved." Pet. App. 4a, 10a (emphasis in original). It was not enough that in 1998 the parties treated the Lease Amendments (which *did* require approval by the Secretary), as part of an integrated whole with the Arbitration Settlement Agreement and the Stipulated Arbitration Award. It was not enough that Peabody's complaint made repeated references to the 1998 Lease Amendments as well as the arbitral award. Peabody Arizona Complaint ¶¶ 46, 47, 48, 50, 51, 52, 53, 54, 77(g), 77(h), 77(i). Nor was it enough that the 1998 Arbitration Settlement Agreement stated that "the parties have agreed to a settlement premised on the final and irrevocable resolution on the arbitration proceedings *and the submission of the Lease Amendment Agreement* (attached hereto as Exhibit B) *to the Secretary of the Interior ('Secretary') for his approval*." Peabody Arizona Complaint ¶ 40 (emphasis added).

The Ninth Circuit concluded that "no action of the . . . Secretary is necessary to give full and final effect to the

arbitration award," Pet. App. 4a-5a, even though the arbitral award became void if the Secretary did not approve the 1998 Lease Amendments that incorporated the royalty rate specified in the arbitral award, and even though Peabody's obligation to pay a $4.5 million bonus to the Navajo Nation was expressly contingent on the promises *both* in the 1998 Lease Amendments *and* in the Arbitration Settlement Agreement. Pet. App. 5a.

In addition, the Ninth Circuit opined that Peabody's complaint "does not allege that the Navajo Nation is currently in breach of any provision of a lease or lease amendment." Pet. App. 9a. According to the court of appeals, it was not enough that the Navajo Nation has filed three lawsuits seeking to invalidate those leases, as amended, including a declaration that they are voidable and further seeking Peabody's ejectment. *See* pp. 11-14, *supra*. The court held that there was no jurisdiction even though the Navajo Nation itself acknowledged the existence of federal question jurisdiction in its 1993 Arizona complaint and in the joint arbitration petition in 1998. *See* pp. 8, 12, *supra*.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has decided an important question of federal law in square conflict with the decisions of at least three other circuits. The court of appeals held that there is no federal question subject-matter jurisdiction over an action to enforce an arbitration award and a federally approved mineral lease amendment between a federally recognized Indian tribe and a private corporation. The Ninth Circuit reached that result even though the dispute between Peabody and the Navajo Nation is

centered on the validity of the federal approval of the lease amendments – not merely their construction or interpretation. The court's holding is squarely in conflict with decisions in the Fifth, Eighth, and Tenth Circuits.

The Ninth Circuit's decision is important because it threatens to disrupt the congressional scheme for fostering commercial relationships between Indian tribes and private parties. Congress has created extensive federal regulation of Indian mineral leasing and development. Under this scheme, an action to enforce a federally approved lease amendment properly belongs in federal court, particularly where a tribe disputes the validity of federal approval.

Peabody did everything possible to secure a federal forum for the enforcement of its lease amendments with the Navajo Nation, including obtaining Secretarial approvals. Yet the court of appeals held that this was not enough. The facts of this case are extreme: the parties expressly reaffirmed the validity of the federally approved 1987 Lease Amendments in 1998. In addition, they treated the 1998 arbitration award as inextricably intertwined with the 1998 Lease Amendments that received Secretarial approval, and further provided that the arbitral award would become void if the Secretary did not approve the 1998 Lease Amendments that incorporated the royalty rate specified in the arbitral award. If federal jurisdiction does not arise in this case, it is difficult to imagine any instance in which it would arise, under the Ninth Circuit's reasoning.

If the Ninth Circuit's decision is permitted to stand, parties in commercial dealings with Indian tribes will be unable to secure federal court enforcement of their federally

approved agreements, even when the agreements expressly contemplate Secretarial review and approval, federal court enforcement, and a waiver of tribal sovereign immunity in such circumstances. Private parties will have no recourse if the tribes attempt to invalidate or nullify those agreements, as the Navajo Nation has attempted to do here.

Indeed, the special circumstances of this case make summary reversal appropriate. The Navajo Nation has filed three lawsuits seeking to invalidate the 1987 Lease Amendments. The grounds raised by the tribe in its proliferation of lawsuits are the very grounds rejected by this Court in its *Navajo Nation* decision.

A. THE NINTH CIRCUIT'S JUDGMENT CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

The dispute between Peabody and the Navajo Nation centers on the validity of the federal approval of the 1987 Lease Amendments. The issue is not simply a matter of contract interpretation or construction. Accordingly, the validity of the lease amendments is an obvious federal question in this case. In *Norton v. Larney*, 266 U.S. 511, 515 (1925), for example, this Court held that there was federal question jurisdiction over a suit to quiet title for allotted Indian lands because the outcome directly hinged upon the meaning of the federal scheme (in particular, the mode of identifying the intended allottee). This Court opined: "it thus appears that the right set up by appellees would be defeated by the construction of the act, as appellants contend, but would be supported by the opposite construction. The case, therefore, in fact is one arising

under a law of the United States within the meaning of section 24, subdivision 1, of the Judicial Code." *Id.* at 515.

By the same token, in this case the Navajo Nation has taken the position that the Secretary's approval of the 1987 Lease Amendments is invalid and that the lease amendments should be canceled or reformed. In contrast to the Ninth Circuit, other circuits have held that the unique federal interests in federally approved Indian leases give rise to federal question jurisdiction over actions to establish the validity of the leases. The Ninth Circuit's judgment cannot be reconciled with these decisions. It is clear that, if this case had arisen in the Fifth, Eighth, or Tenth Circuits, the ruling below would have been precisely the opposite.

For example, in *Tenneco Oil Co., v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574 (10th Cir. 1984), the Tenth Circuit found federal jurisdiction in a dispute between an Indian tribe and an oil company over oil and gas leases approved by the Secretary of the Interior. Pursuant to tribal law, the tribe petitioned a tribal administrative body to cancel the leases. In response, Tenneco brought a federal suit for declaratory and injunctive relief to affirm the validity of the leases and prevent their cancellation. The Tenth Circuit held that Tenneco's claim had raised a federal question. *Id.* at 575.

The court of appeals began by explaining that federal question jurisdiction was present in part because of the sovereign status of the Indian tribes, under this Court's precedent establishing that "in cases involving a sovereign other than the United States 'the primacy of federal concerns is evident' because of Congress' plenary power over foreign relations." *Id.* at 575 (quoting *Verlinden B.V.*

v. Central Bank of Nigeria, 461 U.S. 480, 493 (1993)). The Tenth Circuit also cited the fact that the mineral leases in question were "subject to the regulations of the Secretary of the Interior" and that the lease agreement evidenced an intent that the "structure of federal law would be the final arbitrator in all disputes concerning the lease." *Id.* at 575-76. The court noted that the lease provided that it "shall be subject to the regulations of the Secretary of Interior now or hereafter in force. . . . " *Id.* (internal quotation and citation omitted). Accordingly, the Tenth Circuit concluded "[w]e hold that federal question jurisdiction is present." *Id.* at 576.

Two years later, the Tenth Circuit followed *Tenneco* in another case that raised a jurisdictional issue regarding tribal oil and gas leases. In *Superior Oil Co. v. United States*, 798 F.2d 1324 (10th Cir. 1986), the court held that federal question jurisdiction was present where an oil company sought declaratory and injunctive relief requiring an Indian tribe to approve an oil and gas lease assignment and permits to undertake seismic exploration on tribal lands subject to commercial leases. The Tenth Circuit emphasized that federal question jurisdiction in *Tenneco* had been based on the system of federal regulation of oil and gas leases. 798 F.2d at 1330.

Similarly, in *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001), the Fifth Circuit held that there was federal question jurisdiction over a dispute precipitated by a tribe's attempt to have mineral leases declared void. The tribe had filed two lawsuits – one in federal court, later voluntarily dismissed, and one in tribal court – alleging, among other things, that the leases were void. *Id.* at 569. The oil companies then sought declaratory relief in federal district

court, filing a motion in which they asked the court to rule "that the disputed leases are in full effect." *Id.* The tribe moved to dismiss, arguing that the district court lacked subject-matter jurisdiction. The district court rejected that argument, citing IMLA and finding that its authority to adjudicate the dispute was "beyond question." *Id.* at 573.

The Fifth Circuit affirmed, on the ground that the extensive federal regulation of oil and gas leases created subject-matter jurisdiction. The court of appeals began by rejecting the tribe's contention that jurisdiction was lacking "because the contested oil and gas leases were mere contracts." *Id.* The Fifth Circuit opined that the Indian mineral leases "belie[d] characterization as routine contracts" and stated that this was a "significant distinction" from those cases suggesting that routine contract disputes do not belong in federal court. *Id.* at 575. "Tribal oil and gas leases represent a very specialized subset of contracts" because of the federal regulatory scheme governing them. *Id.* at 574-75. "The federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question jurisdiction over the instant dispute between the Tribe and oil companies." *Id.* at 574. *Accord Chuska Energy Co. v. Mobil Exploration & Producing N. Am., Inc.*, 854 F.2d 727, 729-30 (5th Cir. 1988) (federal question jurisdiction over case involving oil and gas assignment would be permissible "if Chuska had sued . . . the Navajos to enforce the agreement").

Similarly, in *Rainbow Resources, Inc. v. Calf Looking*, 521 F.Supp. 682 (D. Mont. 1981), the plaintiff oil lessee, Rainbow Resources, Inc. ("Rainbow"), sought to block enforcement of a temporary restraining order issued in the Blackfeet Tribal Court, which prohibited Rainbow's removal of its equipment from the leased lands. *Id.* at 682.

The court concluded that: "Congress has chosen to grant exclusive authority for the regulation, administration and supervision of oil and gas leases on lands allotted to . . . Indians to the Secretary of the Interior. . . . [I]mplicit in this congressional act is a cause of action for declaratory and injunctive relief relating to enforcement of the regulations prescribed under 25 U.S.C. [§§] 396[a-396d]." *Id.* at 684.

The rule represented by these decisions governs even outside the context of mineral leases. For example, in *Gaming World International v. Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003), the Eighth Circuit held that there was federal jurisdiction over a dispute regarding the validity of an Indian gaming contract under the relevant federal regulatory scheme. The court opined that "the extensive regulatory scheme governing tribal oil and gas leases conferred federal jurisdiction over a contract dispute between a tribe and two oil companies in *Comstock*. The regulatory scope of [the federal Indian statute] is similarly far reaching in its supervisory power over Indian gaming contracts. . . . Since this case raises issues under the extensive regulatory framework of [the federal gaming statute] it is not a routine contract dispute." *Id.* at 848. *See also Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (finding federal jurisdiction over casino dispute in which a management company went to federal court for an order to compel arbitration after a tribe had filed a declaratory action challenging validity of contract).

The Ninth Circuit's judgment cannot be squared with these decisions by other circuits, which properly recognize that disputes over Indian mineral leases are far removed from garden-variety contract claims. Mineral leases

between Indian tribes and private companies like Peabody are part and parcel of a federal regulatory scheme that not only requires Secretarial approval of mineral leases and their amendments – a significant federal issue in and of itself – but also implicates the strong federal interest in relations with other sovereign nations. Thus, the decisions outside the Ninth Circuit turn on the nature of the federal scheme for the approval of leases and regulation of mining activities – not simply on whether an Indian tribe has attempted to apply tribal law to the commercial activity of a non-Indian. Indeed, whether federal jurisdiction exists regarding a dispute over the validity of federal approval of a lease amendment cannot depend on whether, in a particular case, a tribe has chosen to attempt to apply tribal law to the activity in question. The voluntary actions of the parties cannot affect the federal question arising from the federal regulatory scheme.

In short, under decisions outside the Ninth Circuit, the Navajo Nation's attempts to invalidate the 1987 and 1998 Lease Amendments plainly would have been enough to trigger federal question jurisdiction. The Ninth Circuit's judgment creates a circuit conflict and warrants this Court's review.

B. THIS COURT'S REVIEW IS NECESSARY BECAUSE THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW.

The question presented by this case is an important issue of federal law. Congress required private parties to tribal mineral leases to obtain secretarial approval and Peabody compiled, and secured the consent of the tribe to a specific federal judicial forum in which to enforce its

lease amendments with the Navajo Nation. It did everything it could to assure that a federal court would be available to adjudicate the validity of the leases. But the Ninth Circuit has held that Peabody's efforts were in vain. In so holding, the court of appeals has left Peabody – and all other similarly situated private parties – without any remedy and has rendered the federally approved lease amendments a federally approved right without a remedy.

There is no feasible alternative to federal judicial enforcement. The Navajo Nation has suggested that Peabody sue in Indian tribal court, but the Navajo Nation has not waived sovereign immunity in tribal court. Nor are state courts adequate forums. "Federal protection of tribal self-government precludes either criminal or civil jurisdiction of state courts over Indians or their property absent the consent of Congress." Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 6.C.2.a (1982); *see also Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 754-55 (1998) (state court lacked authority to entertain civil suit against Indian tribe); *Morgan v. Colorado River Indian Tribe*, 436 P.2d 484, 486 (Ariz. App.), *vacated on other grounds*, 443 P.2d 421 (1968) (Arizona state courts lack jurisdiction over suits against Indian tribes absent congressional authorization); 28 U.S.C. § 1360(a) (granting six states (but not Arizona) limited jurisdiction over certain civil actions involving Indians).

The problems created by the Ninth Circuit's holding are not limited to Peabody or to coal leases. The court of appeals' decision has staggering implications well beyond this case. Congress has enacted a wide variety of statutes requiring the Department of Interior's approval of agreements relating to Indian land transactions. *See, e.g.*, 25 U.S.C. § 311 (public highways); §§ 312-318 (railroad,

telegraph, telephone line rights-of-way, and town site stations); § 319 (telephone and telegraph rights-of-way); § 320 (railway reservoirs or materials); § 321 (pipeline rights-of-way); § 323 (rights-of-way for any purpose); §§ 396a-396g (leases for oil and gas mining and permits to prospect); § 399 (leases for mining purposes); § 407 (sale of dead and fallen timber).

Private parties and Indian tribes have entered into agreements under all of these statutes. The decision below casts into doubt the ability of private parties to avail themselves of federal court jurisdiction to establish the validity of any such leases or contracts, even if the agreements expressly contemplate Secretarial review and approval, federal court enforcement, and a waiver of tribal sovereign immunity. The net result will be to disrupt the congressional scheme for encouraging private parties to do business with federally approved Indian tribes.

If the decision below is permitted to stand, economic investment and development will be stifled for the very Indians that Congress has sought to assist. The Ninth Circuit's decision will substantially interfere with federal Indian policy – not simply in the context of coal mining leases, but across the board.

C. SUMMARY REVERSAL IS WARRANTED HERE.

This Court's review is especially appropriate in this case because the reasons advanced by the tribe in its lawsuits against Peabody to repudiate the validity of the 1987 Lease Amendments are the very arguments asserted by the tribe and rejected by this Court in *Navajo Nation*.

In its Arizona and Washington, D.C. lawsuits against Peabody, the Navajo Nation has challenged the validity of the 1987 Lease Amendments. In particular, the Navajo Nation has argued: (i) that the Interior Department engaged in improper *ex parte* communications with Peabody's consultant in the 1980s; (ii) that these contacts resulted in the Interior Secretary's improper intervention in, and stay of, an administrative appeal of a royalty rate decision on the Navajo North Lease (Lease No. 8580); (iii) that this intervention, and the Navajo Nation's ignorance of these events, placed the Navajo Nation at a bargaining disadvantage during the negotiations leading to the 1987 Lease Amendments; and (iv) that the Secretary's subsequent approval of the 1987 Lease Amendments contained unfair and improvident terms. *See* pp. 11-14, *supra*.

Yet these are the very same allegations rejected by this Court in *Navajo Nation*. This Court considered the tribe's "principal" contention that "the [Indian Mineral Leasing Act's ('IMLA')] statutory and regulatory scheme, viewed in its entirety, attaches fiduciary duties to each Government function under that scheme, and that the Secretary acted in contravention of those duties by approving the 12½ percent royalty contained in the amended Lease." 537 U.S. at 506-07. The Navajo Nation contended that Secretarial approval of a 12.5% rate was "improvident, . . . because it allowed the Tribe's coal to be conveyed for what [the Secretary] knew to be about half of its value." *Id.* at 510 (internal quotation marks omitted). This Court flatly rejected that contention and held that the Secretary's approval of the 12.5% royalty rate was entirely proper:

> the Tribe can point to no guides or standards circumscribing the Secretary's affirmation of coal

> mining leases negotiated between a Tribe and a private lessee. Regulations under the IMLA in effect in 1987 established a minimum royalty of ten cents per ton. *See* 25 C.F.R. § 211.15(c) (1985). But the royalty contained in Lease 8580 well exceeded that regulatory floor. . . . At the time the Secretary approved the amended Lease, it bears repetition, 12½ percent was the rate the United States itself customarily received from leases to mine coal on federal lands. Similarly, the customary rate for coal leases on Indian lands issued or readjusted after 1976 did not exceed 12½ percent.

Id. at 510-11 (footnotes and citations omitted). *See also id.* at 500 n.6. Inasmuch as the Secretary approved a royalty rate well in excess of the "bare minimum royalty rate" established by federal regulations for Indian coal mining leases, this Court found nothing "improvident" about the Secretary's approval of the 1987 Lease Amendments. In this regard, the Court specifically rejected the Navajo Nation's attempts to impose a duty on the Secretary in approving Indian coal royalty rates to maximize profits for the Tribes, to act in the best interests of the Tribes, or to conduct independent economic studies. *Id.* at 508 n.12, 511 & n.16.

This Court likewise rejected the Navajo Nation's "second argument" – the contention that "concentrates on the 'skew[ing]' effect of Secretary Hodel's 1985 intervention, *i.e.*, his direction to Deputy Assistant Secretary Fritz to withhold action on Peabody's appeal from the Area Director's decision setting a royalty rate of 20 percent." *Id.* at 511. The Navajo Nation argued that the "Secretary's actions, both in intervening in the administrative appeal process, and in approving the amended Lease, . . . were not

based upon an assessment of the merits of the royalty issue; instead, . . . they were attributable entirely to the undue influence Peabody exerted through *ex parte* communications with the Secretary." *Id.* This Court characterized the Navajo Nation's legal contention as a complaint that, as a result, "its bargaining position was seriously compromised when it resumed negotiations with Peabody in 1985," resulting in "the Secretary's ultimate approval of the 12½ percent royalty [that] was an outcome fundamentally unfair to the Tribe." *Id.* at 512-13.

Again, this Court flatly rejected the tribe's argument. This Court held that the Secretary's *ex parte* communications were entirely permissible, wholly eliminating the underpinnings of the Navajo Nation's claims of procedural infirmity. "Nothing in § 396a, the IMLA's basic provision, or in the IMLA's implementing regulations proscribed the *ex parte* communications in this case, which occurred during an administrative appeal process largely unconstrained by formal requirements." *Id.* at 513 (citing 25 C.F.R. § 2.20 (1985) (Commissioner may rely on 'any information available to [him] . . . whether formally part of the record or not.))."

This Court also observed that the Navajo Nation had an administrative mechanism at its disposal that would have provided for formal review of the Area Director's decision, but the Navajo Nation declined to invoke this procedure. 537 U.S. at 513. This Court noted that the then-applicable Interior Department regulations provided two different tracks for securing administrative review of an Area Director's decision: an *informal* review before the Indian Commissioner (who, due to a vacancy, was the Deputy Assistant Secretary); and a *formal* administrative adjudication before the Board of Indian Appeals. The parties were pursuing an informal administrative appeal,

which this Court noted did not prohibit *ex parte* communications. *Id.* Under this informal track, when the Deputy Assistant Secretary did not issue a decision by June 1985, the Navajo Nation could have exercised its right to transfer the appeal to the formal track before the Board of Indian Appeals. The Tribe failed to do so:

> Either party could have effected a transfer of Peabody's appeal to the Board of Indian Appeals. . . . Exercise of that option would have triggered review of a more formal character, in which *ex parte* communications would have been prohibited. *See* 43 C.F.R. § 4.27(b) (1985). But the Tribe did not elect to transfer the matter to the Board, and the regulatory proscription on *ex parte* contacts applicable in Board proceedings thus did not govern.

Id. at 513 (citations omitted).

Finally, this Court found the Navajo Nation's reliance upon Deputy Assistant Secretary Fritz's "draft opinion letter" to be misplaced because:

> even if Deputy Assistant Secretary Fritz had rendered an opinion affirming the 20 percent royalty approved by the Area Director, it would have been open to the Secretary to set aside or modify his subordinate's decision. . . . As head of the Department of the Interior, the Secretary had "authority to review any decision of any employee or employees of the Department." 43 C.F.R. § 4.5(a)(2) (1985). . . . Accordingly, rejection of Peabody's appeal by the Deputy Assistant Secretary would not necessarily have yielded a higher royalty for the Tribe.

Id. at 513-14.

CONCLUSION

This Court has already rejected the arguments asserted by the tribe against Peabody to dispute the validity of the 1987 Lease Amendments.

The jurisdictional question at issue here is of broad and recurring significance – can private parties invoke federal court jurisdiction to enforce tribal contracts approved by the Interior Secretary, especially when the validity of that approval is disputed. Judicial review of the validity of federal administrative action properly belongs in federal, and not tribal, court.

This Court should summarily reverse the Ninth Circuit's judgment so that Peabody is able to enforce this Court's decision in *Navajo Nation* against the tribe and secure a judgment establishing the procedural and substantive validity of the 1987 Lease Amendments.

The petition for writ of certiorari should be granted. Alternatively, because the Ninth Circuit has interfered with Peabody's ability to enforce this Court's mandate in *Navajo Nation*, summary reversal is warranted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PEABODY COAL COMPANY; PEABODY WESTERN COAL COMPANY; PEABODY HOLDING GROUP, INC., *PLAINTIFFS-APPELLANTS,* v. NAVAJO NATION, *DEFENDANT-APPELLEE.*	No. 03-15272 D.C. No. CV-02-00318-RCB OPINION

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
February 9, 2004 – San Francisco, California

Filed June 15, 2004.

Before: Mary M. Schroeder, Chief Judge,
Richard C. Tallman and Consuelo M. Callahan,
Circuit Judges.

Opinion by Judge Tallman

COUNSEL

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Terry E. Fenzl, Brown & Bain, Phoenix, Arizona, for the defendant-appellee.

OPINION

TALLMAN, Circuit Judge:

This appeal addresses whether a district court has subject matter jurisdiction over a suit brought for enforcement of an arbitration award by a non-Indian corporation against the Navajo Nation (or "the Nation"), a federally recognized Indian tribe located primarily in Arizona. The complaint filed by Plaintiffs Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Group, Inc., (collectively "Peabody") seeks enforcement of an arbitration settlement agreement made between the parties in 1998 setting royalty rates for coal mined pursuant to a commercial lease. The lease itself had been previously approved by the Department of the Interior. Peabody contends that the federal question in this case is the enforceability of commercial Indian mineral leases approved by the Secretary of the Department of the Interior ("Secretary") under federal law. We hold that Peabody's claim does not meet the requirements of federal question jurisdiction under 28 U.S.C. § 1331, and we affirm the district court's dismissal of the case.

I

In 1964, Peabody's predecessor in interest (the Sentry Royalty Company) leased the right to mine substantial coal deposits located on Navajo lands (lease No. 8580). In exchange for the right to mine this coal, Peabody agreed to pay the Navajo Nation a royalty fee (a percentage of the monthly gross revenue obtained from sale of the coal). Under this original lease agreement, the Secretary was authorized to make reasonable adjustments to these royalty rates after twenty years, and every decade thereafter. In 1966, the parties entered a second lease for a different parcel of land (lease No. 9910), which did not permit the Secretary to make royalty rate adjustments.

Under the Indian Mineral Leasing Act of 1938 ("IMLA"), 52 Stat. 347, 25 U.S.C. §§ 396a-396g, the Secretary must approve mineral leases between Native tribes and commercial companies to ensure that a tribe's profits are maximized and that the lease terms are in the tribe's best interest. 25 U.S.C. § 396a. Leases 8580 and 9910 were accordingly approved by the Secretary.

In 1984, after the leases had been in effect for some twenty years, the Chairman of the Navajo Nation asked the Secretary to readjust the royalty rates. An Interior Department Area Director for the Bureau of Indian Affairs ("BIA"), Donald Dodge, issued an initial decision raising the royalty rate for lease No. 8580 to 20%, a substantial increase over the prior level of 12.5%. Peabody challenged Dodge's decision in an administrative appeal lodged with the Department of the Interior. The Navajo Nation has alleged that, during the pendency of Peabody's appeal, a lobbyist hired by Peabody made improper *ex parte* contacts with then-Secretary Donald Hodel to encourage him to reduce the royalty rate. Secretary Hodel allegedly asked the BIA to delay issuing its decision, which allowed Peabody more time to negotiate with the Navajo Nation to obtain a lower rate.

Negotiations continued and eventually, in 1987, the parties agreed to amend the original leases in several ways. First, the 1987 amendments specified a royalty rate for lease No. 8580 of 12.5% and for lease No. 9910 of 6.25%. The parties agreed to petition the Secretary to vacate Area Director Dodge's previous decision setting the rate at 20%.

Next, the amendments created new procedures to adjust royalty rates in the future. Removing the provision

in lease No. 8580 that permitted the Secretary to set a reasonable royalty rate, the parties substituted arbitration clauses in both leases as "the sole and exclusive method for the determination or readjustment of royalty rates . . . for periods beginning on and after February 1, 1984." If the parties could not agree upon new rates, they agreed in advance to submit to binding arbitration. The Navajo Nation also agreed to waive its sovereign immunity from actions to enforce or appeal any resulting arbitration decision:

> Lessor and its officers acting in their official capacity consent to suit in the United States District Court for the District of Arizona for the limited purpose of the enforcement or appeal of any arbitration decision pursuant to this Article, and agree not to raise sovereign immunity or exhaustion of tribal remedies as a defense to such suit.

1987 Amendments to Lease No. 8580, ¶ 12. The 1987 lease amendments were approved by Secretary Hodel as being in the Navajo Nation's best interest.

In the late 1990s, the parties attempted to renegotiate the royalty rates. When negotiations failed, the Navajo Nation requested arbitration in 1998 under the procedures created by the 1987 lease amendments. Although an arbitration panel was convened, the parties were able to reach a negotiated settlement. The settlement was memorialized in an arbitration award. The 1998 award retained the 1987 royalty rates (12.5% on lease No. 8580, 6.25% on lease No. 9910). Unlike the underlying mineral leases and their amendments, the arbitration award did not require approval by the Secretary. The parties agreed that "no

action of the . . . Secretary is necessary to give full and final effect to the arbitration award."

In addition, the parties executed a brief amendment to the leases. Under this amendment, Peabody agreed to pay the Navajo Nation a lump sum bonus payment of $4,500,000 in exchange for "the covenants, promises, terms and conditions contained herein and in the separate Settlement Agreement between the parties [.]" Bruce Babbitt, the new Secretary of the Interior, approved this 1998 lease amendment on March 29, 1999.

These events nonetheless spawned several lawsuits in different jurisdictions.[1] In 1999, the Navajo Nation sued Peabody and several other defendants in the United States District Court for the District of Columbia ("D.C.action"). The Nation alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and other related claims stemming from Peabody's alleged *ex parte* contacts with former Secretary Hodel. The relief sought by the tribe includes reformation of lease No. 8580 to incorporate the 20% royalty rate proposed by Area Director Dodge in 1987.

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[1] Not at issue in this appeal is the Navajo Nation's 1993 suit against the Secretary in the Court of Federal Claims, alleging that former Secretary Hodel breached his fiduciary duty to the tribe by meeting *ex parte* with a Peabody lobbyist during the royalty rate dispute in 1984, and by failing to approve the 20% royalty rate that the BIA initially recommended. The United States Supreme Court recently rejected the Nation's claim for compensation because it did not derive from any liability-imposing provision of the IMLA or its implementing regulations. *United States v. Navajo Nation,* 537 U.S. 488, 493 (2003), *rev'g* 263 F.3d 1325 (Fed. Cir. 2001), *rev'g* 46 Fed. Cl. 217 (2000). That case is currently on remand to the Court of Federal Claims. *See Navajo Nation v. United States,* 347 F.3d 1327, 1332 (Fed. Cir. 2003).

At issue in this appeal is the complaint Peabody filed on February 21, 2002, in the United States District Court for the District of Arizona ("Arizona action"), seeking to enforce the 1998 final arbitration award between the parties. Peabody's complaint contends that because the 1998 arbitration settlement agreement was entered by the arbitration panel as a final award, and because the Navajo Nation did not appeal the award, it is enforceable in the District of Arizona under the Navajo Nation's waiver of sovereign immunity in the 1987 lease amendments.[2]

On March 29, 2002, the Navajo Nation filed a motion to dismiss Peabody's Arizona action for lack of subject matter jurisdiction due to Peabody's failure to present a federal question. Arizona District Judge Robert C. Broomfield held a brief hearing on the motion, during which counsel for the Navajo Nation was asked where Peabody could bring suit to enforce the arbitration award if not in the District of Arizona. The Navajo Nation suggested that the only court with jurisdiction would be a Navajo tribal court. Judge Broomfield granted the Navajo Nation's motion to dismiss, finding no federal question jurisdiction

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[2] Peabody has repeatedly tried to consolidate the two actions pending in the District of Columbia and in Arizona. In March 2002, Peabody requested the United States District Court for the District of Columbia to stay the D.C. action or transfer it to Arizona. The court declined to do so, noting that the Navajo Nation's waiver of sovereign immunity in the 1987 Amendments applies only to actions that challenge an arbitration decision, not to RICO or fraud claims. *Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 277-78 (D.D.C. 2002), *aff'd*, 64 Fed. Appx. 783, 784 (D.C. Cir. 2003).

Count Two of Peabody's complaint in the District of Arizona sought to compel arbitration of "all matters that are the subject of the Navajo Nation's [D.C. action]." Because Peabody's complaint was dismissed for lack of jurisdiction, the court below did not reach this request.

under 28 U.S.C. § 1331 because enforcement of the arbitration award did not raise any question about the leases or the Secretarial approval process under federal law.

II

A

We review de novo a district court's dismissal of a complaint for lack of subject matter jurisdiction. *Arizona Pub. Serv. Co. v. Aspaas,* 77 F.3d 1128, 1132 (9th Cir.1996) (as amended). We will accept the district court's factual findings on jurisdictional issues unless they are clearly erroneous. *Id.*

B

Federal courts have original jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. For a case to "arise under" federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.,* 463 U.S. 1, 27-28 (1983). The fact that the defendant is a Native sovereign is not, by itself, sufficient to raise a federal question. *Gila River Indian Cmty. v. Henningson, Durham & Richardson,* 626 F.2d 708, 714 (9th Cir.1980).

Peabody is not bringing a cause of action created by federal law. *See Gen. Atomic Co. v. United Nuclear Corp.,* 655 F.2d 968, 969 (9th Cir.1981) (holding that 9 U.S.C. § 9 does not create federal question jurisdiction in an action to

confirm an arbitration award). Thus, the company must establish that its "right to relief necessarily depends on resolution of a substantial question of federal law." *See Franchise Tax Bd.*, 463 U.S. at 27-28, 103 S.Ct. 2841. Peabody asserts in its opening brief that the federal question in its complaint is "the enforceability of commercial Indian mineral leases the Interior Secretary approved under federal law." Peabody's actual complaint seeks enforcement of the final arbitration award, not the underlying leases or lease amendments, but Peabody argues that the Secretary's approval of the 1997 lease amendments, together with the general federal regulatory scheme governing such mineral leases, raises an issue of federal law. Peabody also contends that the Navajo Nation's assertion of exclusive tribal jurisdiction at the hearing before Judge Broomfield raises a federal question. We disagree.

We have previously considered whether the federal regulation and approval of a contract or lease gives rise to a significant federal question that will establish jurisdiction under 28 U.S.C. § 1331. In *Littell v. Nakai,* 344 F.2d 486 (9th Cir.1965), we examined a complaint brought by the General Counsel of the Navajo Nation against the Chairman of the Navajo Tribal Council for tortious interference with a contract. Even though the contract between the parties had been authorized by federal law and approved by federal officials, we held that we had to examine the particular facts of the claim asserted before determining whether a federal question was present. *Id.* at 488-90. The gist of the dispute between Littell and Nakai involved a straightforward interpretation of the employment contract itself; the fact that the contract was approved by federal officials was not relevant to the resolution of the

parties' dispute. *Id.* Therefore, we held that Littell's complaint did not present a federal question. *Id.*

More recently in *Arizona Pub. Serv. Co. v. Aspaas,* the main case upon which Peabody relies, we considered a dispute between the Navajo Nation and the Arizona Public Service Company ("APS"), a non-Native party operating a power plant on Navajo land pursuant to a lease approved by the Secretary. 77 F.3d at 1129-30. The Navajo Nation agreed in the lease that it would not regulate APS's operation of the power plant. *Id.* at 1130. APS enforced an anti-nepotism policy at the power plant, and the tribe initiated proceedings in a tribal forum to enjoin the policy and enforce tribal law. *Id.* at 1131. APS invoked the arbitration provisions in the parties' lease, but the Navajo Nation declined to participate. *Id.* After the Navajo Supreme Court decided that APS's policy violated the Navajo Nation's tribal employment laws, APS sued in federal court to enjoin the Navajo Nation from regulating APS's employment policies in light of the provisions in the lease agreement. *Id.* We held that a federal question was presented because the case involved a determination of whether the Navajo Nation had exceeded its authority by regulating the employment policies of a commercial entity doing business on tribal lands. *Id.* at 1134.

Aspaas is not dispositive in this appeal. Peabody's complaint below does not allege that the Navajo Nation has attempted to regulate Peabody's coal mines. *Aspaas* involved APS's claim that the Navajo Nation had directly breached a term of a federally approved lease by regulating APS's internal operations at the power plant. *See id.* In contrast, Peabody's complaint in the Arizona action does not allege that the Navajo Nation is currently in breach of any provision of a lease or lease amendment; Peabody

seeks enforcement of the arbitration royalty award, not the lease. Peabody relies heavily on our statement in *Aspaas* that the fact that a contract is subject to federal approval is "highly probative" of whether a federal question is present. Yet the final arbitration award for which Peabody seeks enforcement was *not* federally approved. Instead, the parties agreed that "no action of . . . the Secretary [was] necessary to give full and final effect to the arbitration award."

In cases from other jurisdictions involving contracts between Native sovereigns and non-Natives, the federal question in each case was either a tribal government's authority to apply tribal law to the commercial activities of non-Indian companies, or the validity of mineral leases themselves, which are both questions that can be answered only by reference to federal statutory or common law.[3] For example, in *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas,* 261 F.3d 567 (5th Cir. 2001), the Fifth Circuit considered a dispute between a tribe, which sought to have mineral leases declared void in its new tribal court, and an oil company, which sought a declaratory judgment in federal court that the leases were valid. *Id.* at 569. Noting that "[t]he question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one

[3] In a letter brief filed pursuant to Federal Rule of Appellate Procedure 28(j), Peabody directs our attention to *Gaming World Int'l v. Chippewa Indians,* 317 F.3d 840 (8th Cir. 2003), in which the Eighth Circuit held that a dispute over whether an Indian gaming contract received valid approval was a proper basis for federal jurisdiction. *Id.* at 848. We agree with the Navajo Nation that because this case does not involve the validity of the coal leases, *Gaming World Int'l* does not help Peabody's position.

that must be answered by reference to federal law and is a 'federal question' under § 1331," *id.* at 572 (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 852 (1985)), the *Comstock Oil* court concluded that it also had jurisdiction to determine whether the oil and gas leases were valid due to the extensive federal regulation of these types of leases. *Id.* at 573-75; *see also Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1077-78 (9th Cir.1990) (holding that whether a tribe had the authority to enforce a tribal ordinance against a non-Native was a federal question); *Superior Oil Co. v. United States,* 798 F.2d 1324, 1328-29 (10th Cir. 1986) (holding that whether the Navajo Nation exceeded its authority by withholding approval of oil and gas lease assignments under the IMLA was a federal question); *accord Chilkat Indian Vill. v. Johnson,* 870 F.2d 1469, 1474 (9th Cir. 1989); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla.,* 725 F.2d 572, 575-76 (10th Cir. 1984).

Peabody relies on *Comstock Oil, Superior Oil,* and *Tenneco Oil* for the proposition that oil and gas leases on tribal lands are not mere contracts. Instead, many courts have noted that these leases "represent a very specialized subset of contracts" because of the extensive federal regulatory scheme governing them. *Comstock Oil,* 261 F.3d at 574-75. While that is certainly true, Peabody's claim here does not allege any problem with the underlying leases or their amendments. The only contract at issue in Peabody's claim is the arbitration settlement agreement, which is not a specialized type of contract that is subject to extensive federal regulation.

This case is thus markedly different from the decisions cited above. Peabody does not contest the validity of the coal mining leases or their amendments, nor does it

allege that the Navajo Nation has breached a lease or lease amendment.[4] The Navajo Nation has not attempted to exceed its authority by regulating any aspect of Peabody's commercial enterprise under tribal law. Navajo tribal courts have not attempted to subject Peabody to their jurisdiction. In cases where a Native sovereign has not tried to assert authority over a non-Native party, and where the validity of a federally-regulated contract is not at issue, courts have not found a substantial federal question to be present. *See, e.g., Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians,* 94 F.3d 747, 752-53 (2d Cir. 1996) (holding that where the validity of a contract was not disputed, the fact of federal review and approval did not convert a simple breach of contract claim into a federal cause of action); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 999 F.2d 503, 507 (11th Cir. 1993) (finding no federal question jurisdiction where plaintiff only presented facts establishing a breach of contract claim); *Littell,* 344 F.2d at 487-88 (holding that there is no federal question where the main dispute is centered on a contract and its construction, rather than the validity of the federal approval of the contract); *accord Gila River Indian Cmty.,* 626 F.2d at 714-15. As in these

[4] Peabody has submitted, pursuant to Federal Rule of Appellate Procedure 28(j), a copy of a complaint the Navajo Nation filed against Peabody in an unrelated action in the United States District Court for the District of Arizona. In that complaint, the Navajo Nation contends that the coal mining leases are invalid because the Nation must share a portion of its proceeds with the Hopi Tribe. *See Peabody Coal v. Navajo Nation,* 75 F.3d 457 (9th Cir. 1996). Peabody contends that the Navajo Nation's complaint is an "admission" that federal jurisdiction arises under the IMLA and that this admission supports Peabody's position. We disagree. Unlike the separate action the Navajo Nation has filed, Peabody's complaint does *not* allege any problem with the validity of the underlying coal mining leases.

cases, Peabody's claim for enforcement of an arbitration award sounds in general contract law and does not require the resolution of a substantial question of federal law.

Although Peabody's claim is titled "Enforcement of an Arbitration Award," the company has not alleged that either party is failing to comply with the award. As Peabody conceded at oral argument, coal is being mined and sold. Peabody is paying royalties to the Navajo Nation at the rates found in the arbitration award. There is simply no need for the award to be "confirmed," as Peabody suggests in its reply brief. Whether the Navajo Nation is somehow in breach of this award is an issue that can be resolved by the common law of contracts. Federal approval of the underlying leases or amendments has no material bearing on whether this award requires confirmation or enforcement. Therefore, Peabody's complaint does not present a federal question.[5]

C

Peabody's second asserted basis for federal question jurisdiction is the statement made by the Navajo Nation's counsel at the motion hearing before Judge Broomfield regarding the proper court where Peabody may bring an action to enforce the award. The Navajo Nation's attorney stated that because Peabody's claim for enforcement of the

[5] It is well-settled that the provisions of 9 U.S.C. § 9 do not by themselves confer subject matter jurisdiction. *Gen. Atomic Co.*, 655 F.2d at 969. In this case, we do not decide whether the existence of a federal question in an arbitrated dispute would confer subject matter jurisdiction under 28 U.S.C. § 1331 to confirm or enforce the resulting arbitration award pursuant to 9 U.S.C. § 9. Rather, we simply hold that no substantial federal question was arbitrated or implicated here.

arbitration award did not raise a federal question, the proper forum for such an action would be the Navajo Nation's tribal courts instead of federal court. Whether a tribal court may assert jurisdiction over non-Natives is certainly a question of federal law, *see United States ex rel. Morongo Band of Mission Indians v. Rose,* 34 F.3d 901, 905 (9th Cir. 1994), but the Navajo Nation has not hailed Peabody before its tribal courts. Because Peabody's complaint makes no reference to any existing dispute about asserted tribal court jurisdiction or authority, no federal question is present. *See Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (1937) (federal courts may only resolve real or substantial controversies, "admitting of specific relief through a decree of a conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts").

III

The district court correctly dismissed this case for lack of subject matter jurisdiction because Peabody's complaint did not present a substantial question of federal law. We need not reach the Navajo Nation's suggestion to affirm on the alternate grounds of sovereign immunity or Peabody's failure to state a claim under Fed. R. Civ. P. 12(b)(6).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PEABODY COAL CO., et al.,	)	No. CIV 02-318 PCT RCB
Plaintiffs,	)	ORDER
vs.	)	(Filed Jan. 14, 2003)
THE NAVAJO NATION,	)	
Defendant.	)	

On February 21, 2002, Plaintiffs Peabody Coal Company, and its affiliates (Peabody) filed a Complaint (doc. # 1) seeking to enforce a 1998 arbitration settlement agreement made with Defendant Navajo Nation, or in the alternative, an order compelling arbitration of the issues being litigated in a law suit now pending before the United States District Court for the District of Columbia. The Navajo Nation has filed a Motion to Dismiss (doc. # 17) this action for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. The Navajo Nation has also filed a Motion to Transfer this case to the District of Columbia should the motion to dismiss be denied (doc. # 14). Peabody has filed a Motion for Summary Judgment (doc. # 22). On June 17, 2002, the Navajo Nation moved for leave to file a sur-reply to Peabody's motion for summary judgment (doc. #). The Court has considered the briefing submitted by the parties, and after oral argument and being fully informed of the cause, now rules.

I. BACKGROUND

Sentry Royalty Company (predecessor of Peabody) entered into a coal mining lease with the Navajo Nation

effective February 1, 1964. The lease was subject to reasonable adjustment of the royalty rates by the Secretary of the Interior after twenty years, and every ten years thereafter. In 1966, the parties entered into a second lease covering a different area (South Lease) that did not include a royalty rate adjustment provision.

In 1984, the Area Director for the Interior Department determined that the royalty rates for the original lease should be adjusted upward to 20%. Peabody protested and a series of negotiations, appeals, and meetings between the parties ensued. Finally, in 1987, a settlement was reached (1987 lease amendments). The original lease was amended to give the Navajo Nation a 12.5% royalty rate and the royalty rate of the South Lease was adjusted to 6.5%. The 1987 lease amendments also eliminated the provision authorizing the Secretary of the Interior to make adjustments to the royalty rates. Instead, an arbitration clause was inserted into both the original lease and the South Lease. The arbitration clause allowed the parties to renegotiate royalty rates every ten years. If an agreement could not be reached the parties were required to submit the issues of royalty rates and royalty tax caps to binding arbitration. Each party would have the right to select an arbitrator, and if a third neutral arbitrator could not be agreed upon, the parties could petition the Chief Judge for the District of Arizona to appoint the third member of the arbitration panel. The Navajo Nation further agreed to submit to the jurisdiction of the court in the District of Arizona and not raise the defense of sovereign immunity in any action to enforce an arbitration award under this provision of the lease.

In 1994, the parties attempted to renegotiate royalty rates under the leases. The negotiations failed and, in

accordance with the 1987 lease amendments, the parties submitted the issue to arbitration. Each side chose an arbitrator but they were unable to agree upon the third member of the arbitration panel. Therefore, they petitioned the Chief Judge for the District of Arizona[1] to appoint a neutral arbitrator. The Chief Judge granted the petition and selected the third member of the arbitration panel.

The parties submitted briefs to the arbitration panel but came to a settlement before the arbitration proceedings commenced (1998 agreement). The 1998 agreement left the royalty rates at the 1987 rate of 12.5% on the original lease and 6.5% on the South Lease. They submitted the agreement to the arbitration panel for approval, which was granted. Then, in accordance with the Indian Mineral Leasing Act (IMLA), 25 U.S.C. § 396a, the parties sought approval of the 1998 agreement from the Secretary of the Interior, and that approval was given.

There are two lawsuits pending in other courts that are relevant to the present Complaint. In 1993, the Navajo Nation filed suit in the Federal Claims Court against the Secretary of the Interior claiming that he breached his fiduciary duty to the Navajo Nation by holding ex parte meetings with Peabody representatives during the initial royalty rate dispute, and for failing to approve the 20% royalty rate recommended in 1984. The Federal Claims Court determined that the Secretary of the Interior had not breached his fiduciary duty to the Navajo Nation. *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000).

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[1] The undersigned was the Chief Judge at the time but this personal nexus has no bearing on issues involved.

That decision was appealed, and the Federal Circuit reversed. *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001). The Supreme Court has granted certiorari. *United States v. Navajo Nation*, ___ U.S. ___, 2002 WL 458716 (Mem.) (June 3, 2002). Although the Supreme Court's decision could have a bearing on the outcome of these proceedings, that opinion has not as yet been issued and the issues in this case remain ripe for determination.

The second action that has some bearing on this case was filed by the Navajo Nation against Peabody and several other parties in 1999 in the U. S. District Court for the District of Columbia (D.C. action). The Hopi Tribe has also intervened as a plaintiff. Plaintiffs in the D.C. action allege violations of the Civil RICO statute, fraud, and various other causes of action relating to the to the [sic] 1987 lease amendment. The factual allegations in the D.C. action largely mirror those asserted by the Navajo Nation in its action against the Secretary of the Interior. Plaintiffs seek various forms of relief, including reformation of the lease to incorporate a 20% royalty rate.

On February 21, 2002, Peabody filed the Complaint (doc. # 1) in the present case. The Complaint recites the long history of lease disputes between the parties and the events leading to the 1987 lease amendments and 1998 agreement. There is also some mention of the two other lawsuits discussed above. The Complaint then proceeds to outline two causes of action.

Count one of the Complaint alleges that the arbitration panel approved the 1998 agreement as the final arbitration award, and the Navajo Nation did not seek to vacate or appeal the award. Complaint (doc. # 1) ¶¶ 73-75. According to the allegations of the Complaint, the 1998 agreement

is final and can only be enforced in this Court. *Id.* ¶ 76. Finally, the Complaint alleges that "[t]he arbitration provisions of the 1987 Lease Amendments were repeatedly ratified by the Navajo Nation" through various actions, including obtaining approval of the 1998 agreement from the Secretary of the Interior. *Id.* ¶ 77. Peabody then asks the Court to enforce the final arbitration award. *Id.* ¶ 78.

Count two of the Complaint alleges that the issues now being litigated in the D.C. action are subject to arbitration under the 1987 lease amendments. *Id.* ¶ 80. Accordingly, Peabody asks the Court for an order compelling arbitration of all issues currently being litigated in the D.C. action. *Id.* ¶ 81.

On March 29, 2002, the Navajo Nation filed a motion to dismiss. The Navajo Nation argues that this Court lacks subject matter jurisdiction because the Complaint does not present a federal question. The Navajo Nation also claims that it has sovereign immunity, which means that this Court lacks personal jurisdiction over it. Lastly, the Navajo Nation argues that the Complaint fails to state a claim upon which relief can be granted.

Peabody responded to the Navajo Nation's motion to dismiss and filed a motion for summary judgment arguing that the arbitration award should be enforced and any remaining issues must be arbitrated. After the summary judgment motion was fully briefed, the Navajo Nation moved for leave to file a sur-reply arguing that it did not have a fair opportunity to respond to new factual issues raised in Peabody's reply.

II. DISCUSSION

Federal courts are courts of limited jurisdiction. *Owen Equip. Co. v. Kroger*, 437 U.S. 365, 374 (1978). This Court can only entertain cases whose subject matter falls within the limits prescribed by the Constitution and enacted by Congress. *See id.* Subject matter jurisdiction is not waivable. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988). The Court has a duty to inquire into whether it has jurisdiction over a particular matter, and can do so at anytime. *Id.* Additionally, the parties cannot create subject matter jurisdiction by stipulation or consent. *Holman v. Laulo-Rowa Agency*, 994 F.2d 666, 668 n.1 (9th Cir. 1993) (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939)).

A. 28 U.S.C. § 1362: Indian Tribes

Peabody claims the Court has subject matter jurisdiction over this case pursuant [sic] 28 U.S.C. § 1362, which reads: "The district courts shall have original jurisdiction of all civil actions, *brought by any Indian tribe or band* with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (emphasis added). The language of this statute clearly indicates that it is only applicable in actions brought by an Indian tribe or band. Peabody initiated this action, and it unquestionably is not an Indian tribe or band. Therefore, § 1362 is inapplicable to the present case.

B. 28 U.S.C. § 1331: Federal Question

Peabody's Complaint also premises jurisdiction in this case upon 28 U.S.C. § 1331. Section 1331 is the general federal question jurisdiction statute. It reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." For a case to "arise under" federal law, and thus satisfy this statute, a substantial question of federal law must be presented on the face of the Plaintiffs well-pleaded complaint. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). The possibility of a defense based on federal law, or allegations anticipating such a defense, do not satisfy the jurisdictional requirement of § 1331. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983). Furthermore, the presence of an Indian tribe in the dispute is not alone sufficient to raise a federal question. *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1989).

1. Waiver and Consent

Peabody argues that the Court has federal question jurisdiction over this case because, in 1998, the Court granted Peabody and the Navajo Nation's joint petition to appoint an arbitrator. That arbitration eventually resulted in the arbitration award Peabody seeks to enforce. Peabody further argues that subject matter jurisdiction is present because the Navajo Nation declared in the joint petition that federal court jurisdiction was proper.

Peabody's argument of waiver and consent is unavailing. Peabody is essentially claiming that the Navajo Nation waived its right to dispute the Court's subject

matter jurisdiction in this case because of the petition to appoint an arbitrator in 1998, or that the court has already determined that it has subject matter jurisdiction by virtue of its involvement in the appointment of arbitrators. The Court's action in granting the previous petition is irrelevant to whether Peabody has raised a federal question in its present Complaint. Although factually related, the petition to appoint an arbitrator is not part of this case. Moreover, the Court must inquire into whether it has subject matter jurisdiction at any time. *See Emrich*, 846 F.2d at 1194 n.2. Therefore, even if granting the original petition was somehow relevant to this case, the issue of subject matter jurisdiction is not waived and the Court must still determine whether it has jurisdiction to hear this action.[2] Further, the alleged concessions by the Navajo Nation in the petition to select an arbitrator cannot establish subject matter jurisdiction because parties cannot create federal court jurisdiction by consent. *Holman*, 994 F.2d at 668 n.1.

2. Federal Arbitration Act

Peabody next claims that the Federal Arbitration Act, 9 U.S.C. §§ 1-14, establishes federal question jurisdiction to enforce the 1998 agreement. This argument is also ineffective. The Federal Arbitration Act does not create an independent basis for federal question jurisdiction. *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983); *General Atomic Co. v. United*

[2] The morality of a sovereign reneging on its solemn promise to waive its sovereign immunity to suit and submit itself to the jurisdiction of a particular court, while interesting, is not a matter for the court to consider.

Nuclear Corp., 655 F.2d 968, 970 (9th Cir. 1981). Therefore, the fact that Peabody seeks enforcement of the 1998 agreement or an order compelling arbitration under the Federal Arbitration Act is not in itself sufficient to establish federal question jurisdiction.

3. Indian Mineral Leasing Act (IMLA)

Finally, Peabody claims that federal question jurisdiction exists in this case because the Navajo Nation invoked the IMLA during the arbitration proceedings and in the D.C. action. Plaintiff's Opp'n to Def.'s Mot. to Dismiss (doc. # 33) at 13.[3] Peabody also argues that the Court has jurisdiction because the arbitration and the 1998 agreement involved the IMLA. *Id.* at 12. To the extent these arguments again suggest that the Navajo Nation has consented to federal question jurisdiction, the Court has previously observed that such reasoning lacks merit. Although somewhat close for the reasons indicated, the Court also concludes that Peabody's argument that the Complaint states a claim under the IMLA is without legal support under current Ninth Circuit law. Only that court, not this one, can alter that conclusion.

The IMLA requires that all mining leases with an Indian tribe be approved by the Secretary of the Interior. 25 U.S.C. § 396a. The Ninth Circuit has held that "the mere fact that a contract has been authorized by federal law and approved by federal officials does not necessarily

[3] The court notes that Peabody did not include these allegations in its complaint as a basis for this court's jurisdiction. Nevertheless, it has been raised in its response to the motion to dismiss and the court will consider it.

confer federal jurisdiction." *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1133 (9th Cir. 1996) (citing *Littel v. Nakai*, 344 F.2d 486, 488 (9th Cir. 1965)). The court's choice of the term "necessarily" could evidence the view that in some cases such an authorization and/or federal approval would be sufficient to establish subject matter jurisdiction. On the other hand, it could simply mean that such authorization and approval are unrelated to a subject matter jurisdictional determination. The *Nakai* court then went on to note that if the "gist of the dispute centers on the contract and its construction rather than the fact that the contract was approved pursuant to federal statute[]" then there is no federal question jurisdiction. *Id.* (citing *Littel*, 344 F.2d at 488-90).

Peabody's Complaint centers on the contract and its construction, not the underlying federal statute; but, at bottom, seeks enforcement. Count one of the Complaint seeks enforcement of the 1998 agreement because it was allegedly a valid and binding exercise under the arbitration provisions of the lease. Count two of the Complaint alternatively seeks arbitration of the issues being litigated in the D.C. action because the lease terms allegedly require it.

Peabody appears not to have brought into question or raised any issue relating to the approval provisions of the IMLA in its Complaint. The allegations of the Complaint seem to anticipate the Navajo Nation's probable defense that the 1998 agreement and the 1987 lease amendments on which that agreement was based are invalid under the IMLA. Yet, the possibility of a defense based on federal law, or allegations anticipating such a defense, do not satisfy the jurisdictional requirement of § 1331. *Franchise*

Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 14 (1983).

Peabody argues that even if the Complaint does not rely upon the IMLA, the "extensive involvement of IMLA" in the 1998 agreement is sufficient to confer federal question jurisdiction. *Id.* Peabody points to the Fifth Circuit case of *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001), and argues that *Comstock Oil* stands for the proposition that any dispute involving a lease approved pursuant to the IMLA raises a federal question. Plaintiff's Opp'n to Def.'s Mot. to Dismiss (doc. # 33) at 13. This rule, as suggested by Peabody, contradicts the Ninth Circuit precedent which this court is bound to follow. Further, there is a serious question whether *Comstock Oil* is apt in this case. *Comstock Oil* held that "[t]he federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question jurisdiction over the instant dispute. . . ." 261 F.3d at 574. That dispute was whether certain oil and gas leases were void under the IMLA because the Secretary of the Interior had not approved them. *Id.* at 569. Thus, *Comstock Oil* seems to center on the federal statute, as distinguished from focusing on the lease amendments and their construction. In short, for jurisdictional purposes, the fact that the gist of the action is for enforcement, relates more to the contract at issue than the underlying statute.

III. Conclusion

Peabody's Complaint does not present a federal question under 28 U.S.C. § 1331. Therefore, this case must be dismissed for lack of subject matter jurisdiction.

As such, the Court need not address the other issues or motions presented by the parties. The Navajo Nation's motion to dismiss is granted.

IT IS ORDERED that Defendant's Motion to Dismiss (doc. # 17) is GRANTED. This action is DISMISSED for lack of subject matter jurisdiction, without prejudice to any party asserting otherwise in an appropriate forum. The Clerk of the Court is directed to terminate this case.

DATED this 10 day of January, 2003.

/s/ Robert C. Broomfield
Robert C. Broomfield
Senior United States
District Judge

Copies to counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Peabody Coal Co., et al.,	)	**JUDGMENT IN A CIVIL CASE**
Plaintiffs,	)	CIV-02-0318-PCT-RCB
v.	)	(Filed Jan. 14, 2003)
The Navajo Nation,	)	
Defendant.	)	

____ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xxx **Decision by Court.** This action came to trial or hearing before the Court. The Issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss is granted. This action is dismissed for lack of subject matter jurisdiction, without prejudice to any party asserting otherwise in an appropriate forum. The complaint and action are dismissed, plaintiffs shall take nothing.

Date: January 14, 2003 RICHARD H. WEARE

Clerk of Court/DCE

By: /s/ C. Monkan
C. Monkan, Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEABODY COAL COMPANY; et al., Plaintiffs-Appellants, v. NAVAJO NATION, Defendant-Appellee.	No. 03-15272 D.C. No. CV-02-00318-RCB District of Arizona, Phoenix ORDER (Filed Aug. 10, 2004)

Before: SCHROEDER, Chief Judge, TALLMAN, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.